

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1378

To be argued by
RICHARD F. LAWLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1378

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN J. O'CONNOR,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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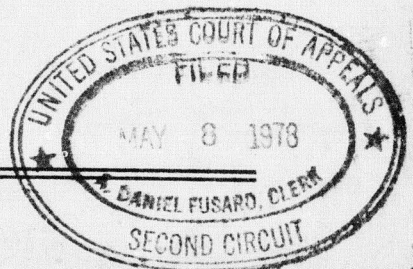




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—v.—

JOHN J. O'CONNOR,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John J. O'Connor appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York after an eight day jury trial before the Honorable Irving Ben Cooper.

Indictment 76 Cr. 1030 filed on November 9, 1976 charged O'Connor in three counts with having violated Title 21, United States Code, Section 622, by taking money while employed as a federal meat inspector from three meat packing companies which he was responsible for inspecting.

The trial began on May 17, 1977 and ended on May 25, 1977 when the jury found the defendant guilty on Counts One and Two and not guilty on Count Three. O'Connor was sentenced by Judge Cooper on both counts to two years imprisonment, with all but 6 months sus-

pended, said sentences to run concurrently. O'Connor is currently free on bail pending this appeal.

Statement of Facts

Synopsis

John O'Connor took weekly bribes in the form of cash or meat products from various meat packers over a two year period. O'Connor would be assigned as an inspector to different wholesale meat packers usually for a six month tour. The meat packers paid the bribes to O'Connor at the end of each week to avoid any harassment by the meat inspector. Once O'Connor had been paid off he would not continue to harass the company. (Tr. 355).*

The Government's Case

A. Function of an Inspector

As a federal meat inspector John O'Connor was employed by the United States Department of Agriculture and given the responsibility to inspect wholesale meat packing plants to insure the cleanliness of the meat product and the sanitary conditions in the plant. Ordinarily each inspector was assigned to 3 or 4 plants for a six month rotation. Each of the plants would be in the same wholesale meat market area. At the start of each day the inspector examined the product as it was brought in by truck to insure that it was clean and was kept under sanitary conditions. He also would inspect the sanitary

* References to the trial transcript will be designated "Tr.", references to Government exhibits will be designated "GX", references to defense exhibits will be designated "DX", references to defendant's brief will be designated "Def. Br.", and references to the joint appendix will be designated "App."

conditions in the plant, including the floors, walls, and meat hooks. In addition the inspector controlled the brands used by each plant to mark the meat that had been processed. These brands were given out by the inspector at the start of each day and put away at closing time. (Tr. 44-48, 106). The inspector would go from plant to plant during the course of a day.

Federal meat inspectors have broad discretionary authority over the plants which they inspect. The regulations are broadly worded and the remedial actions available to an inspector range from a warning to management to actually closing down all or part of the plant or restricting the product the meat company can sell. Unless the matter is very serious there is no requirement that the inspector actually stay at the site while the sanitary or health violation is corrected. (Tr. 48). Each of the government witnesses who operated a plant complained that they paid the inspectors so they would not be harassed and closed down for minor infractions. (Tr. 109, 163, 216B, 355).*

B. Payments to O'Connor

From July 1974 to January 1975 O'Connor was assigned as an inspector to West Harlem Pork Center, Ltd., Kupferberg Brothers, and F. Strassberger, Inc.**

Maurice Jacobson, the manager of West Harlem Pork Center would meet with O'Connor on a Friday, usually as O'Connor was putting away the brands for the week-

* While it was true that the discretion of the inspector was subject to review by the circuit supervisor, in this case there was testimony that the circuit supervisor also accepted bribes. (Tr. 72, 193).

** Though the witnesses did not recall the exact dates of O'Connor's assignment to their plants the Government introduced the dates through time and attendance records maintained by the United States Department of Agriculture. (Tr. 63).

end and he would pay him \$25 in cash. The meetings took place when no one else was around; the payments were made hand to hand and apparently nothing was said by either party. (Tr. 107, 125).

At the same time he was at West Harlem Pork Center O'Connor inspected F. Strassberger where he was paid \$50 cash per week by Bernard Jacobson, a vice president at F. Strassberger. The payments were made on Friday, hand to hand, usually in the office, without anyone else present and apparently nothing was said by either side. (Tr. 157-159). The bribes were paid to avoid being shut down for minor violations. (Tr. 163). Prior to his employment as a meat inspector O'Connor had worked for F. Strassberger and eventually had been the union representative at the plant. There had been disagreements between O'Connor and management while O'Connor was the union representative. Later, at the time of O'Connor's assignment as a meat inspector the owner of F. Strassberger complained about his assignment to the plant since he had been formerly employed there. (Tr. 168).*

The third plant to which O'Connor had been assigned during this period was Kupferberg Brothers and here he was given a \$15 bribe each week by Morris Kupferberg. The payments were made in cash, hand to hand, usually in the plant office, and nothing was said by either side. (Tr. 214).**

O'Connor was not the only inspector being paid at the above plants. The testimony revealed a pattern of corruption involving other United States Department of

* On cross-examination of Bernard Jacobson, O'Connor elicited that the plant had been shut down for 20 minutes on at least one occasion while O'Connor was an inspector. (Tr. 203).

** On cross-examination O'Connor attempted to establish that he could not have been bribed for 2 weeks in September 1974 because he was at a training program in Texas. (Tr. 132).

Agriculture inspectors. However, though inspectors both before and after O'Connor were paid not all inspectors were paid. (Tr. 161, 216A, 299, 354).

The Government also introduced evidence that O'Connor took bribes from two companies not referred to in the indictment. Arthur Vorchheimer, a part owner of J. M. Vorchheimer, paid O'Connor \$50 per week, hand to hand, usually on Friday, with no one else present and without speaking with the defendant. (Tr. 297). Salvatore Cucurullo, a foreman at George Korn & Sons paid O'Connor from October 1973 to January 1974 \$25 in cash per week when O'Connor went to the office to get the brands. The payments were made on Fridays, without anyone else present, hand to hand and without any conversation. (Tr. 354).

The Defense Case

The defense called Richard C. Gentilcore, a special agent with the FBI. Gentilcore testified that he made a list of the meat plants in the E.D.N.Y. to which the defendant had been assigned, which were cooperating with the F.B.I. investigation and had admitted that they had paid other inspectors. Agent Gentilcore then went out and interviewed the officials at those plants to determine if O'Connor or any of the other 15 meat inspectors indicted in the Southern District of New York also had been paid there. Gentilcore was asked by defense counsel about each of the meat houses in Brooklyn except those that had said they paid O'Connor. (Tr. 450-452).*

* Though O'Connor was specifically stopped by the Court from asking whether each Brooklyn house had said they paid O'Connor, the jury was informed that O'Connor had not been indicted in Brooklyn (Tr. 447, 460). On cross-examination Gentilcore said that some of the Brooklyn plants did not remember O'Connor having worked there and three of the plants said they had paid him.

Thomas E. O'Connor, the brother of the defendant and a special agent of the F.B.I. testified that he had asked the defendant if he would help the F.B.I. in their investigation, and that the defendant had refused. Thomas O'Connor said he had been told that in January of 1975 there was no evidence against his brother. (Tr. 546-547).

O'Connor took the stand and recounted each of the meat plants to which he had been assigned as an inspector. He denied that he had ever taken money or anything of value from any of the people who testified they had paid him. (Tr. 591-593). O'Connor also said that except for one instance involving a Christmas ham he was never offered nor did he accept anything more than a cup of coffee from any of the meat packers he inspected. (Tr. 649, 629, 643).

O'Connor also called to the stand F.B.I. agent Charles Christopher who worked in the meat market as an undercover agent. He testified that he had no evidence that O'Connor accepted money. (Tr. 532). O'Connor also had three character witnesses including the associate pastor of his former parish church. (Tr. 650, 656, 662).

Government's Rebuttal Case

Myron Bernstein, the manager of Omaha Hotel Supply Corporation testified that in the summer of 1973, when O'Connor was an inspector in the plant, he used to give him a bag of meat each week. O'Connor would pick up the package on Fridays as he was putting away the brands. (Tr. 674). Sal D'Angelo, a butcher at the plant said he received the order from Bernstein and had the package prepared. (Tr. 698).*

* O'Connor was recalled to the stand and denied receiving the packages. (Tr. 711).

ARGUMENT

POINT I

The Admission of Similar Act Evidence Was Proper.

O'Connor argues that the District Court erred in admitting similar act proof. He asserts that the Government's only purpose in offering the evidence was to show O'Connor's criminal disposition. This claim is incorrect because the similar act evidence showing a common scheme to extort bribes was relevant to the issues at trial, and Judge Cooper did not abuse his discretion in admitting the similar act evidence. See generally, *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied*, — U.S. — (1978).

In this Circuit evidence of other crimes is admissible under Rule 404(b) of the Federal Rules of Evidence "unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). This Court has adopted the "inclusory rule" with respect to similar act evidence, and, thus, the evidence of other crimes is admissible, if relevant for any purpose other than to establish a defendant's criminal character or propensity. *United States v. Gubelman*, Dkt. No. 77-1279, slip op. 1747 (2d Cir., February 24, 1978); *United States v. Benedetto*, Dkt. No. 77-1306, slip op. 1735 (2d Cir., February 24, 1978); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975)

In the instant case the District Court exercised its discretion and permitted the Government to prove that in addition to the bribes charged in the indictment the defendant also received bribes from three other meat companies located in Brooklyn.* This evidence was relevant to demonstrate a common scheme or general plan by O'Connor to use his position as a federal meat inspector to obtain payoffs, and to harass meat companies until the bribes were paid. The bribes accepted by O'Connor from the similar act witnesses showed the same unique scheme and pattern revealed in the crimes charged. They are thus identifiable as the handiwork of the defendant and admissible on that basis. McCormick, Evidence § 190 at 449 (2d ed. 1972). The crimes were committed by O'Connor in his position as a meat inspector; the payments were not only made hand to hand and in cash, but they were all made if possible on the same day—Friday and were made every week. In addition they usually took place in the plant office, often while O'Connor was putting the brands away and usually nothing was said by either of the parties.

In numerous cases courts have allowed similar act evidence to demonstrate a common pattern of conduct. See *United States v. Grady*, *supra*; *United States v. Murphy*, 480 F.2d 256, 260 (1st Cir. 1973), *cert. denied*, 414 U.S. 912 (1973); *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States v. Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States v. Laurelli*, 293 F.2d 830 (3rd Cir. 1961), *cert. denied*, 368 U.S. 961 (1962); *Brehm v. United States*, 196 F.2d 769 (D.C. Cir.), *cert. denied*, 344 U.S. 838 (1952). Specifically, in *United States v. DeSapio*, *supra*, this Court upheld

* Since the other crime evidence was identical to the acts charged in the indictment, O'Connor cannot contend seriously that such evidence was inadmissible because it was not similar.

the introduction of a previous bribe scheme by some of the defendants as relevant to show that the defendants "could well have been continuing along the same line." Similarly, in *United States v. Murphy, supra*, the First Circuit allowed the use of other bribe evidence in a prosecution of a federal meat inspector for bribery, and in *United States v. Laurelli, supra*, the Third Circuit approved the admissibility of the defendant's bribe offer to another government employee made eleven months after the bribe charged in the indictment. The subsequent bribe offer revealed a pattern of similar criminal conduct. Finally, in *Brehm v. United States, supra*, the District of Columbia Circuit allowed proof that a Congressman received money from one employee in a case where he was charged with accepting money from another.

Thus, the evidence revealed a consistent and general scheme to extract money from meat companies in order to prevent harassment in the enforcement of the laws. In *United States v. Benedetto, supra*, and *United States v. Gubelman, supra*, this Court left open the question of whether bribes by other meat companies showed a unique scheme or pattern; the Court was able to decide the cases on other grounds.* We submit, however, that the pattern of conduct in the instant case revealing that the payments were almost always made to O'Connor on a Friday, in the plant office, frequently while O'Connor was putting the meat brands away, and where nothing was said, demonstrates a common scheme to abuse his position of trust. The weekly bribes obtained from one meat company were simply part of an overall scheme to require other meat companies to pay-off O'Connor or risk the possibility of governmental harassment.

* The instant case was tried before this Court's opinions in *Benedetto* and *Gubelman*.

Moreover, the similar act witnesses describing the identical bribe pattern as the meat companies in the indictment, helped to corroborate the testimony of the meat producers referred to in the indictment that they paid O'Connor bribes in a particular way for the same purpose—to prevent O'Connor's official harassment. This Court has recognized explicitly that other crime evidence is admissible to corroborate a witness' testimony. *United States v. Taylor*, 562 F.2d 1345, 1358 (2d Cir. 1977); *United States v. Bermudez*, 526 F.2d 89, 96 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Eliano*, 522 F.2d 201, 202 (2d Cir. 1975); *United States v. Stolzenberg*, 493 F.2d 53, 54 (2d Cir. 1974); *United States v. Falley*, 489 F.2d 33, 37 (2d Cir. 1973). Once defense counsel attacked the credibility of the Government witnesses who testified that they paid bribes to O'Connor in Manhattan, it was entirely proper to permit the Government to corroborate that testimony by showing that O'Connor had engaged in the identical bribery-extortion scheme in Brooklyn.*

Furthermore, in *United States v. Benedetto*, *supra*, slip op. at 1741 this Court observed that there was force to the Government's argument that the evidence showed a continuing plan by Benedetto to use his position as a meat inspector to obtain cash payments, and such evidence was relevant to identify. The Court noted that

* The use of other crime evidence to corroborate a Government witness is demonstrated in the above cited cases. For example, in *United States v. Eliano*, *supra*, the Government witness testified that the defendant caused her to engage in prostitution. This Court sustained the admission of the defendant's conviction for promoting prostitution, in part, because that evidence "corroborated the testimony of one of the prostitutes . . . whose credibility had been attacked by defense counsel." Similarly, in the instant case the credibility of the meat producers referred to in the indictment had been attacked vigorously, and the similar act proof had none of the negative connotations of criminal conviction.

this issue was raised indirectly by the defendant during his cross-examination of Government witnesses, "obviously designed to destroy their credibility by showing that Benedetto was not at the particular plants on the days in question." Similarly in the instant case O'Connor in his opening statement stated that he was in Texas during part of the time the indictment alleged he had received bribes. (Tr. 38). In addition he cross-examined the first two Government witnesses on the same subject, trying to establish that O'Connor was not in New York when he was charged with receiving bribes. (Tr. 82, 132). While defense counsel informed the District Judge that he was not disputing identity (Tr. 273), the opening statement and the cross-examination in the *jury's presence* obviously asked the jury to speculate that some of the witnesses had identified the wrong person. The opening statement and the cross-examination potentially left the impression with the jury that even a meat packer trying to tell the truth may have misidentified the defendant.*

Having decided the evidence was relevant there remains the question of whether the Court properly exercised its discretion under Rule 403 F. R. Evid. in weighing the probative value of the evidence against the possibility of unfair prejudice. *United States v. Gubelman*, *supra* at 1750; *United States v. Benedetto*, *supra* at 1739. This decision is one that has been left for the trial court to determine and will rarely be reversed on appeal. *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Rapoport*, 545 F.2d 802, 805 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United*

* The propriety of admitting the similar act evidence was enhanced when O'Connor on cross-examination denied receiving bribes from anyone. (Tr. 643). See *United States v. Benedetto*, *supra*, slip op. at 1742-43.

States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).*

The District Court carefully considered the issue, reserving a decision until after the Government's direct case had been received, an offer of proof had been made, memoranda submitted by both sides, and oral argument had taken place. (Tr. 267-285). In addition the Court instructed the jury on the proper use of similar act testimony during the trial and then again in its final charge. (Tr. 327, 824). Given the nature of the similar evidence presented its prejudicial impact would have been non-existent.** *United States v. Deaton*, 381 F.2d 114, 118 (2d Cir. 1967). There was none of the indicia of a "bloody shirt" being waived in front of the jury. *United States v. Robinson*, *supra*, 560 F.2d at 514; *United States v. Leonard*, *supra* at 1091. This type of evidence is not highly emotional evidence whose introduction could inflame a jury's passions against the defendant, and convict him not because of the relevant evidence, but because he is a bad person. As stated by the Court in *United States v. Gubelman*, *supra* at slip op. 1752 in commenting upon the potential prejudice from the introduction of similar act evidence identical to that introduced against O'Connor: "... testimony concerning extremely similar acts is not inflammatory in the way that an unrelated violent crime might be."

* In *United States v. Leonard*, *supra*, 524 F.2d at 1092, this Court stated that the balancing of relevance against prejudice is primarily for the trial judge who

"... has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain."

** The fact that O'Connor was acquitted, on one count clearly shows that the jury was not so influenced and prejudiced against O'Connor that he was convicted because he was a bad person. A discriminating jury was able to decide the case based on the evidence, and not on emotional considerations.

POINT II**The Government's Questioning of Defense Witness Gentilcore Was Proper.**

O'Connor argues that the Government's cross-examination of defense witness Richard Gentilcore, an FBI agent, was improper, and that the District Judge's striking of the testimony and cautioning the jury to disregard the testimony was not sufficient to dissipate the prejudice. In view of the direct examination of Gentilcore, the question asked on cross-examination was proper. In any event the question merely was cumulative of the similar act testimony, and the District Court insured that the cross-examination did not prejudice the defendant.

As its first defense witness O'Connor called FBI Agent Richard Gentilcore and extensively questioned him about his investigation into O'Connor's work as an inspector at meat plants in Brooklyn. Gentilcore testified that O'Connor had worked in ten or twelve meat plants in Brooklyn which were now cooperating with the Government's investigation. Gentilcore testified that these plants had admitted making payments to inspectors, yet none of the employees of these plants said they ever paid O'Connor. (Tr. 444). O'Connor also elicited the information that he had not been indicted in Brooklyn. (Tr. 445). Gentilcore then testified that he had reinterviewed the officials at these meat plants in Brooklyn. Defense counsel questioned Gentilcore as to each employee reinterviewed at nine of the Brooklyn meat packers. (Tr. 450-453). This line of questioning was terminated only when O'Connor attempted to ask Gentilcore if a specific person at a particular meat plant had told Gentilcore that he had paid off O'Connor. (Tr. 460-61). During this direct examination there was no mention made of the three meat houses where witnesses admitted they had bribed O'Connor.

The clear implication of O'Connor's line of questioning was to infer that O'Connor had not received bribes from any of the plants which he inspected while in Brooklyn. In an effort to clarify this erroneous impression created by O'Connor's direct examination, the Government asked Gentilcore if he had found during the course of his investigation that three meat packing houses in Brooklyn had acknowledged payoffs to O'Connor. When the witness responded "yes," and before any objection was made, Judge Cooper immediately instructed the jury to disregard the answer. (Tr. 465). The District Judge again admonished the jury to disregard the answer, and explained that the evidence was hearsay. (Tr. 469). Indeed Judge Cooper went so far as to ask each juror if he could disregard the answer, and each answered in the affirmative. (Tr. 469-72).

While the District Judge recognized that the Government's question called for hearsay testimony, it should be emphasized that the question was designed to correct the erroneous impression elicited by defense counsel through his own improperly leading question of the witness which also elicited hearsay evidence—namely, that the agent had talked to several cooperating meat packers in Brooklyn and that they had told him that they had not paid off O'Connor. That impression was erroneous because three meat packers investigated by the agent in Brooklyn had bribed O'Connor.

Furthermore, O'Connor's complaint apparently does not go to the hearsay nature of the testimony, but to the claim that the jury might have believed that the other meat companies mentioned by Gentilcore were additional similar acts. During the re-direct examination of Gentilcore it was made clear to the jury that two of the meat packers referred to in his cross-examination had previously testified. (Tr. 474-75). The third meat packer testified in the Government's rebuttal case. Therefore,

the "yes" response to the question whether Gentilcore had learned from three meat houses in Brooklyn that O'Connor was paid off was cumulative of the similar act evidence.

Moreover, the District Court's quick action in striking the answer and twice admonishing the jury to ignore the testimony was adequate to dissipate any prejudice. Each juror informed the Court that he would disregard the answer, (Tr. 471) and no further mention of Gentilcore's stricken testimony was made.*

* O'Connor attempts to make much of the fact that Juror No. 9 when asked if the Court's instructions were clear said, "I will disregard that but I have a little bit of difficulty." At which point the Court said:

"No, don't say anything other than what I am asking you. I don't want you to tell me about a difficulty that may cause us a mistrial here. Just address yourself to what the Judge is asking. This happened, and I am trying to find out whether there is any prejudice, or whether the jury can disregard what was brought out by that question.

I want your answer to that.

Juror No. 9: I can disregard it." (Tr. 471).

The District Court explained later why he took the sound precaution of interrupting Juror No. 9:

"Counsel indicated that Juror Number 9 wanted to add something. It was obvious to me, by the tone of voice and the words that he employed that he could obey the Court's instructions, but what was troubling him was something else. I didn't want him to reveal that something else, for fear it might be prejudicial. It was something that he should take up with his fellow jurors at the appropriate time.

I want it distinctly understood that I got the clear impression from Juror Number 9 that what he was launching into was an additional matter that had nothing at all to do with the inquiry I was then conducting." (Tr. 486).

POINT III

The District Court Was Correct In Its Rulings on O'Connor's Direct Examination and Cross-Examination.

O'Connor argues that he was denied the right adequately to present a defense by the District Court's erroneous rulings which limited his direct and cross examination of certain witnesses. He claims that he should have been permitted to introduce FBI reports and other documents used to refresh witnesses' recollections. Since each piece of evidence was hearsay which O'Connor claims was improperly excluded, Judge Cooper was correct in precluding the admission of the challenged evidence. Surely these evidentiary rulings were not an abuse of the discretion given to the trial court in deciding whether to admit certain evidence, *United States v. Robinson, supra*, and to control cross-examination. *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976).

O'Connor's first argument is that he should have been allowed to introduce FBI reports of interviews by FBI agents with various meat packers. According to the reports these meat packers told the agents that they had not paid O'Connor. These written reports are hearsay, and in fact appear to be double hearsay since they record what the meat packers told the agent who wrote the report. O'Connor does not suggest any exception to the hearsay rule to allow for the admission of either the written statement of the agent who wrote the report or the meat packer's statements to the agent who memorialized the interview. No exception exists.

O'Connor's next claim is that in his cross examination of government witness Kupferberg, the trial court committed reversible error in not permitting him to introduce

the transcript of a conversation between Kupferberg and another inspector named Arturo Romanelli.* On cross examination O'Connor asked Kupferberg if he had paid money to Romanelli. Kupferberg said that he did not remember that name.** (Tr. 241). However, Kupferberg said that he had been shown a transcript by the Assistant United States Attorney of a conversation he purportedly had with Romanelli. (Tr. 242). He was then shown the transcript and he said that it was the same one. O'Connor attempted to use the transcript to refresh Kupferberg's recollection as to whether he had paid Romanelli. The transcript did not refresh his recollection. He said that only a picture of the person he paid off would do that. (Tr. 252-3). On redirect, Kupferberg did not deny that he may have bribed Romanelli, but said that he did not remember him. (Tr. 262). The Court then read the transcript and after argument by both sides sustained the Government's objection to its admission. (Tr. 263, 266).

O'Connor has demonstrated no proper basis to permit the introduction of the recorded conversation. The witness Kupferberg never denied that he had paid money to Romanelli. He also admitted that he had paid off meat inspectors; he simply could not recall the name Romanelli. (Tr. 262). Thus, the offered transcript was not admissible as a prior inconsistent statement. Indeed even if the transcript were inconsistent, the transcript was not admissible as substantive evidence because the witness was not under oath when the statement was made. Rule 801(a)(1)(A), F. R. Evid. Finally, the defendant never offered the actual tape into evidence, and without authenticating the tape the defendant could not possibly establish a foundation for the admissibility of the transcript.***

* At the time of the recorded conversation, Romanelli was working as an undercover meat inspector.

** On his direct examination, Kupferberg admitted that he had paid other inspectors. (Tr. 216(A)).

*** At no time did O'Connor attempt to call Romanelli as a witness to testify that he was paid off by Kupferberg.

O'Connor's third example of error by the trial court is as meritless as the first two. On cross-examination by O'Connor, Salvator Cucurullo—a meat producer—was asked if he recalled the numbers of the photographs of meat inspectors he had identified in the United States Attorney office.* Cucurullo said that he did not remember the numbers. He said he just identified the photos and never mentioned any numbers. (Tr. 379). O'Connor showed Cucurullo a memorandum prepared by an Assistant United States Attorney. The witness was asked if the memorandum refreshed his recollection as to the number of the photograph.** It did not refresh his recollection. (Tr. 379). O'Connor then attempted to introduce the memorandum into evidence and the Court sustained the Government's objection. (Tr. 384). O'Connor cites no authority to justify the admission of the memorandum. The memorandum was not admissible simply because it did not refresh the witnesses' recollection. Federal Rule of Evidence.*** In addition, the memorandum was not a prior inconsistent statement of any kind since Cucurullo identified only photographs and not numbers.**** Finally, of course, the memorandum was hearsay.

* The United States Attorney's office had a book with pictures of meat inspectors in it which was shown to meat packers to assist them in identifying those inspectors they had bribed. Each picture was numbered. (Tr. 380).

** The memo listed the names of meat inspectors Cucurullo said he had paid. Next to each name was the number of the photograph. The number next to O'Connor's name was not correct, it was 87 instead of 86.

*** Rule 612, F.R. Evid., discusses the admissibility of writings used to refresh a witness's recollection. The rule is inapplicable here because the witness's recollection was not refreshed by the document, and the rule allows the *adverse* party—here the Government—to introduce portions of the document which relate to the witness's testimony.

**** If the memo was such a "cornerstone" of O'Connor's defense the question remains as to why he did not call the Assistant United States Attorney who prepared the memo.

POINT IV

The Court's Instructions to the Jury Were Proper.

O'Connor's final claim is that he was denied a fair trial by the court's charge on the legislative purpose of the Meat Inspection Act and the two *Allen* charges. These claims are without merit.

Judge Cooper briefly explained to the jury the legislative purpose of the Meat Inspection Act. (Tr. 810). There was no error in giving such a charge. It has long been the law that the trial court has the responsibility to assist the jury in understanding the evidence. *United States v. Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970). In fulfilling this responsibility, there is nothing improper with the District Court explaining to the jury the purpose of the statute they are considering. As long as the instruction is correct there is no reason to believe that such a charge could be prejudicial; the charge simply helps to explain to the jury the reason for a particular law. Here O'Connor does not complain that the substance of the instruction was erroneous, and any claim would be to no avail.* See *United States v. Seuss*, 474 F.2d 385, 388 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973); *United States v. Murphy*, *supra*, at 258.

* O'Connor cites no authority to support his claim that the charge should not have been given. His reliance on *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976) is misplaced since that case involved argument in summation by the prosecutor about the purpose of the law. The court found the remarks inadmissible and improper. It is precisely because neither the Government nor the defense can present evidence on the purpose of the law that the Court has the responsibility to do so. *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977), *cert. denied*, 98 Sup. Ct. 188 (1978). Absent a claim that the instructions were wrong, it is hard to envision a more proper charge.

O'Connor's objection to the *Allen* charge and the District Court's remarks to the jury is meritless. The jury sent out a note saying "We are a hung jury." (Tr. 871). Thereafter, the Court gave the *Allen* charge. Before going home for the night, the jury said it had not reached a verdict as to any of the charges. The next morning, the court again read the *Allen* charge. The jury returned its verdict finding the defendant guilty on two counts and not guilty on the third count some six hours after the second *Allen* charge was given. Thus, the charge obviously was not coercive. Moreover, this Court repeatedly has upheld the discretion of the trial judge to give an *Allen* charge. See, e.g., *United States v. Robinson*, *supra* at 517; *United States v. Rodriguez*, 545 F.2d 829 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 3215 (1977); *United States v. Stewart*, 513 F.2d 957, 959 (2d Cir. 1975); *United States v. Zane*, 495 F.2d 633, 692 (2d Cir. 1974); *United States v. Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974). O'Connor neither cites any authority nor specific language in the charge given as justification for his claim that the charge was coercive or in any way improper.*

* O'Connor also makes reference to the trial court's comment on a remark overheard by the court from the jury room. (Def. Br. 49). It is clear from the remarks reprinted below that there was nothing coercive in the court's statement to the jury:

... "However, after several minutes and immediately before your response was handed to the marshal, a loud male voice was heard to scream out, "Don't give him any information on any count."

Assuming that was said, I merely wish to urge you to lower your voices, and I wish to make the observation that that type of contribution, if true, to jury deliberation has no value whatever.

Sending in that note is a practice that has been indulged in over the decades, pursuant to law, and when it is done in order to aid the convenience of jurors, the failure of anyone to recognize the kindly spirit that prompted the inquiry is particularly distressing." . . . (Tr. 880).

There is nothing in that reasonable statement which can be conceived of as coercive.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard F. Hawler being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *8th* day of *May*,
19*78*, he served a copy of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

Gerard Damiani
McCormack + Damiani
PO Box 652
455 Route 304
Bardonia, New York

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mail-
ing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Richard F. Hawler

Sworn to before me this

8th day of *May*, 19*78*
Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979